Office - Supreme Court, U.S.
FILED
SEP 14 1982
ALEXANDER L. STEVAS,
CLERK

82-643

SUPREME COURT NUMBER _____

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

OCTOBER, 1981 TERM

DANIEL P. O'LEARY,

Petitioner - Appellant,

V.

STATE OF ALABAMA,

Respondent - Appellee,

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD:

Petitioner's Attorney
W. Kenneth Gibson
Taylor, Benton & Gibson, P.C.
P. O. Box 471
Fairhope, AL 36533
(205) 928-0282

Respondent's Attorney
J. Anthony McLain
Special Assistant
Attorney General
567 South Hull Street
Montgomery, AL 36104
(205) 262-0336

A. QUESTIONS PRESENTED FOR REVIEW:

1. Whether the State Court erred in upholding an exploratory warrantless search of a berthed sailboat and an anchored motor vessel located one mile apart in state waters where the County Deputies who were in charge of the surveillance and ordered the boardings admitted the absence of probable cause or other recognized exception and where members of the boarding party included U. S. Customs Officers who acknowledged during a Hearing on Motion to Suppress that they had no reason to board the vessels at all, save for the specific command of a Baldwin County Deputy who admitted that the Deputies' own purpose for searching the vessel was to conduct an "exploratory search" for "contraband" and where the Customs Officers later, at trial, asserted blanket authority pursuant to 19 U.S.C. Section 1581(a) for boarding the vessels.

2. Whether 19 U.S.C. Section 1581(a) is unconstitutional.

3. Whether the State Court erred in refusing to follow the mandate of the recent companion Supreme Court decisions of United States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65 L.Ed.2d, 619 (1980) and Rawlings v. Kentucky, 448 U. S. 98 100 S. Ct. 2556, 65 L.Ed.2d, 633 (1980), requiring the reversal and remand of proceedings where a defendant relied upon the now overruled "Automatic Standing Rule" for the purpose of affording the defendant an opportunity to demonstrate that his own Fourth Amendment rights were violated, where the record demonstrates that the defendant relied upon "automatic standing" during the Trial Court hearings and on appeal prior to the decisions in Salvucci and Rawlings, Id., but advised the Appellate Court of a change in the law requiring reversal and remand subsequent to the companion decisions of The United States Supreme Court.

4. Whether the State Court erred in refusing to grant Petitioner's Motion to

Quash Grand Jury Venire and Petitioner's Motion to Quash the Petit Jury Venire for the trial set on July 31, 1978, or, in the alternative, to continue the trial setting where a new jury act (Act Number 594, Code of Alabama 1975, 12-16-1, et seq.(Pocket Part)) had been adopted and became effective on April 27, 1978; where the new jury act was adopted for the declared policy that "all persons selected for jury service be selected at random from a fair cross section of the population of the area served"; where evidence adduced at a hearing on the Motion to Quash or in the Alternative Continue held on July 24, 1978, demonstrated that the old jury law containing exemptions from jury service was repealed, that the provisions of the new jury act completely revitalized procedures to be followed in a manner similar to that followed in Federal Court, and where officials of the jury commission testified that full compliance with the new jury act

could be expected within a mere three months time.

B. PARTIES TO THE PROCEEDING:

The named parties are Daniel P. O'Leary and the State of Alabama; however, the constitutionality of an Act of Congress (19 U.S.C. 1581(a)) has been drawn in question and 28 U.S.C. 2403(a) may be applicable, and the Solicitor General's Office has been served with a copy of this petition. The Office of the Solicitor General has been served with a copy of this petition, pursuant to Rule 28 Supreme Court Rules, by mailing a copy to the Solicitor General, Department of Justice, Washington, D.C. 20530.

C. TABLE OF CONTENTS AND TABLE OF CASES AND STATUTES

I. TABLE OF CONTENTS

	Page
A. Questions Presented for Review	1
B. Parties to the Proceeding	4
C. Table of Contents and Table of Cases and Statutes	5-8
D. Reports of Opinions Delivered Below	9
E. Jurisdiction of this Court	9
F. Constitutional Provisions and Statutes Involved	10
G. Statement of the Case	11
1-2. Unconstitutional Search and Seizure and Unlawful Arrest	11
3. Reversal of Automatic Standing Rule	20
4. Jury Issues	22
H. Stage at Which Issues Were Raised	27
I. Argument	29
1-2. Unconstitutional Search and Seizure and Unlawful Arrest	29
3. Reversal of Automatic Standing Rule	31
4. Jury Issues	32

J. Recent Decision Granting Writ of Certiorari in Related Case 34

Certificate of Applicability 35

Certificate of Filing of Brief 36

Certificate of Service of Brief 36

II. TABLE OF CASES

Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 695 (1960) 20

O'Leary v. State, ___So.2d ___ (Ct. of Criminal Appeals, May 6, 1980), reversed ___ So.2d ____ (Ala.S.Ct., January 9, 1981), on remand ____ So.2d ___ (Ct. of Criminal Appeals, June 23, 1981), affirmed ___ So.2d ___ (Ala.S.Ct., May 21, 1982), rehearing denied ____ So.2d ___ (Ala.S.Ct., July 16, 1982) 9,21

Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) 2,20,31

State v. O'Leary, ___So.2d ___ (Ala.S.Ct., May 21, 1982),p.8 21

United States v. Almeida-Sanchez, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) 31

United States v. Jones, 528 Fd.2d 303,304 (9th Cir. 1975) 31

United States v. Molina-Garcia, 634 F.2d 217,218, Note 1 (5th Cir. 1981) 32

United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) 2,20, 21,31

United States v. Villamonte-Marquez, 652 F.2d 481 (5th Cir.1981), rehearing En.Banc. denied 651 F.2d 577 (5th Cir.1981), Petition for Cert. granted, ___ U.S. Law Week (June 7, 1982) 30,34

II. TABLE OF STATUTES

A. Amendments IV,V,VI,XIV to the United States Constitution 10

B. 19 U.S.C. 1581 10,11

C. 19 U.S.C. 1581(a) 1,4

D. 28 U.S.C. 2403(a) 4

E. 28 U.S.C. 1257 10

F. Rule 17 of the Supreme Court Rules 10

G. Act No. 594, Code of Ala. 1975, 12-26-1, et seq. (Pocket Part) 3,10,26

H. Code of Alabama 1975, Section:

1.	12-16-1, et seq.	22
2.	12-16-2	25
3.	12-16-39	23
4.	12-16-41	23
5.	12-16-42	23
6.	12-16-45	24
7.	12-16-46	24
8.	12-16-70	24
9.	12-16-74	24
10.	12-16-75	24

D. REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW:

The reports delivered in the Courts below have not yet been officially reported. The following opinions have been rendered:

O'Leary v. State, ___ So.2d____(Ct. of Criminal Appeals, May 6, 1980), reversed ___ So. 2d_____ (Ala.S.Ct., January 9, 1981), on remand ___ Sc. 2d ____ (Ct. of Criminal Appeals, June 23, 1981), affirmed ____ So. 2d _____ (Ala.S.Ct., May 21, 1982), rehearing denied ___ So. 2d ___ (Ala.S. Ct., July 16, 1982).

All opinions have been included in an appendix, with the exception of the decisions rendered May 6, 1980, and January 9, 1981, which dealt with an issue not involved in this petition.

E. JURISDICTION OF THIS COURT:

The final decision of the Alabama Supreme Court was rendered on May 21, 1982. Application for Rehearing was overruled on July 16, 1982, and an Order granting a Stay of Judgment and Extension of Time to Petition for Writ of Certiorari was entered

by the Court of Criminal Appeals on August 2, 1982.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257 and Rule 17 of the Supreme Court Rules. Petitioner asserts the State Court has decided an important question of Federal Law which has not been, but should be, settled by this Court and that the State Court has decided Federal questions in a way in conflict with applicable decisions of this Court and the Fifth Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISIONS AND STATUTES:

The Constitutional provisions and statutes involved are cited below. The pertinent text is set forth in the appendix.

1-4. Amendments IV, V, VI, XIV to the Constitution of the United States.

5. 19 U.S.C., Section 1581: Boarding vessels

6. Act. No. 594, Code of Ala. 1975, 12-16-2 (Pocket Part).

G. STATEMENT OF THE CASE:

1-2. UNCONSTITUTIONAL SEARCH AND SEIZURE AND UNLAWFUL ARREST:

Petitioner was arrested at 7:00 a.m., on the morning of December 31, 1977, while aboard a forty foot (40') motor vessel, the "Island Girl", while that vessel was at rest in state waters near Bear Point Marina located near Gulf Shores, Alabama. After Petitioner's arrest, a sailing vessel located one (1) mile distant was boarded and an exploratory search was conducted. The sailboat was berthed against the bank, had no occupants on board, and was also located in state waters.

On appeal, the State has not contended that the exploratory, warrantless searches were in any way based on "probable cause" or any other recognized exception, but instead the state's briefs and the appellate opinions have referred exclusively to the provisions of 19 U.S.C. 1581. The applicability and constitutionality of the provision have been challenged.

Baldwin County Deputies who initiated and were in charge of the surveillance at all times observed the motor vessel, "Island Girl" leaving Bear Point Marina, located ten (10) miles east of Gulf Shores, Alabama, at approximately 9:30 p.m., December 30, 1977, proceeding west toward Fort Morgan, with its normal red and green running lights on through the Intercoastal Waterway (ICW), a series of many bays, inlets, and other waterways, interconnected at times with manmade dredged channels, including an east-west channel across Mobile Bay. (Supp.Tr."A" 205, 212).

Baldwin County officials ordered State ABC Agent, Aubrey Little (Public Safety) and Customs Officer, Joe McKnight, to board a small fishing boat and follow the running lights of the "Island Girl" and monitor the course of the vessel through the ICW. The vessel reached a point in the channel in Mobile Bay north of Fort Morgan and came to rest. (Supp. Tr."A" 7, 212).

Later, ABC Agent, Little, and Customs Officer, McKnight, were instructed to transfer to a custom vessel located two (2) miles further to the west of the "Island Girl" in the ICW and began monitoring positions by radar, since it was "very hard to maintain visual contact", as it was very dark at this time. The weather was overcast and there was apparently no moon. (Supp.Tr."A" 10, 27).

Thereafter, McKnight observed an unidentified forty to forty-five foot (40-45') sailboat coming through state waters at the pass at Fort Morgan, which is the same east to west channel across Mobile Bay and is the only area deep enough for navigation. (Supp. Tr."A" 7,27-28,220-221). The sailboat, which was never identified until it was boarded much later, was observed to flash its lights near the clearly marked customs vessel, which was entirely different in configuration from the "Island Girl" (Supp.Tr."A" 7-8, 27-28). Witnesses acknowledged that the channel was of

sufficient width at that point that, in order to see markers, you would have to turn a light from one side to the other to navigate. (Supp.Tr."A" 222).

McKnight acknowledged he had never seen the sailboat prior to that evening, did not know the name of the vessel at any time until it was seized much later the same day, had no information as to the homeport of the vessel, did not know where the vessel came from, had no knowledge whatsoever as to whether the vessel "came foreign" (since, in fact, the ICW runs from east to west and transverses Mobile Bay entirely in state territorial waters), did not know who might be aboard either vessel, could not see any individuals aboard either vessel, and never had any idea what, if anything, might be aboard the vessels. (Supp.Tr."A" 25,27,47,49).

The sailboat allegedly flashed its lights again near the "Island Girl" two (2) miles away, and the vessels were observed by radar only never closer than a quarter of a

mile apart proceeding east through the ICW. The vessels were met by other navigation that night. The other vessels were also observed utilizing spotlights to locate buoys or day markers to assist in navigation in view of the darkness. (Supp.Tr."A" 58).

All activities involving the surveillance were directed by Baldwin County Deputies, specifically James W. Anderson, Chief Deputy, who operated the radio command post and assumed responsibility for "directing the operation", including coordinating surveillance, and by Deputy Bobby Stewart in charge of a land team located near Anderson. (Supp.Tr."A" 76,81).

Deputy Anderson specifically ordered the customs vessel to stop its engines at one point. The sailboat was observed to round a point in land and proceed in a northwardly direction where it subsequently berthed in a cove. The motor vessel, "Island Girl", was observed to proceed in an entirely different direction, where it

stalled again due to intermitted engine difficulty near Bear Point Marina, which was its point of origin. (Supp.Tr."A" 226-227,229).

Nothing further was observed. A report was then received by a land team that some individual had walked into its area. Baldwin County Deputies then gave specific orders to "move in" and "take the vessel down". (Supp. Tr."A" 243-249, 252-252).

The motor vessel, "Island Girl", was boarded first by County Deputy, Howell, State ABC Investigator, Little, and Customs Officer, Montgomery, in response to the order. (Supp.Tr."A" 253). O'Leary and the other occupant of the "Island Girl" were observed below in the engine room "playing with the engine", making repairs to a "malfunctioning engine", later described by an experienced officer who attempted to move the vessel at the request of the Sheriff's Deputies. (Supp.Tr."A" 343). O'Leary was commanded to come on deck and identified him-

self as the Captain in response to questions at gunpoint by Deputy Howell, who then put O'Leary under arrest for possession of controlled substances, none of which were ever seen or found on the "Island Girl". (Supp. Tr."A" 343-345).

The berthed sailboat was then boarded from land by a number of Baldwin County Deputies, ABC Agents, and by a Customs Officer, McKnight, who testified that he would not have boarded the sailing vessel in the absence of the deputies' radio command and stated that he "wouldn't have had any reason" to board the vessel other than the specific command. (Supp.Tr."A" 64-66)(emp. supplied).

After an extensive search of the unoccupied sailboat, materials believed to be contraband were located under a covering in the hold of the sailboat. (Supp.Tr."A" 74-76). Chief Deputy Anderson testified that the purpose of the order for both boardings was

to "search for contraband or something". (Supp. Tr."A" 95).

The vessels were boarded without consent and without a duly authorized search warrant. No police officer during the entire course of the surveillance had ever observed any contraband aboard either vessel nor had any individuals been observed.

The vessels were moved to a nearby marina and searched for a third warrantless search. (Supp. Tr."A" 96-97). Inventories were made but never given to any individual arrested and navigation charts were allegedly taken from the inventorying officer but never listed on any inventory and never produced or made known to counsel until their introduction at trial. (Supp.Tr."A" 96-97,129).

No effort was made to contend the vessels were boarded for a document search. The exclusive motivation was an exploratory search for "contraband." (Supp.Tr."A" 38,29,54). No effort was made to obtain a

search warrant for either vessel, despite the fact that a judge lived a few miles distant. (Supp.Tr."A" 133,136). A search warrant was later obtained for motel rooms on admittedly manufactured circumstances by another deputy who had not participated in any of the surveillance, arrests, or searches, and who had no personal knowledge of any details. (Supp.Tr."A" 373-392). Both of the motel rooms had been previously visited by yet another deputy who conducted what he described as a "visual search" of both rooms. (Supp.Tr."A" 291-292, 294-295).

At trial, evidence was admitted over objection concerning the contraband seized aboard the sailboat, a handgun discovered on the motor vessel (which was not the subject of any charge), and two charts (State's Exhibits 2 and 3) allegedly found aboard the sailboat, one of which was later claimed to have been found aboard the motor vessel, but neither of which were ever listed on invento-

ries nor ever disclosed to counsel, despite appropriate requests. (Trial Tr. 358-361).

The Jury returned a verdict of "guilty", and a maximum sentence of fifteen (15) years was immediately imposed upon Defendant.

3. REVERSAL OF AUTOMATIC STANDING RULE:

The hearings on Petitioner's Motion to Suppress, the trial, and the filing of the Petitioner's briefs with the intermediate State Appellate Court all occurred prior to the reversal of the "Automatic Standing Rule" of Jones v. United States, 362 U.S., 257, 80 S.Ct. 725 4 L.Ed.2d 697 (1960) in the companion decisions of United States v. Salvucci and Rawlings v. Kentucky, supra., which required the reversal and remand of a case where defendants had relied on the "Automatic Standing Rule" in seeking suppression of unlawfully seized evidence and where defendants had not been afforded the opportunity to demonstrate the violation

of the defendants' own Fourth Amendment rights in connection with the search and seizure.

The Court of Criminal Appeals adopted the decision of a retired Circuit Judge, Leigh M. Clark, who concluded that the Petitioner was without standing since there was "nothing in the record or the transcript to indicate that he owned the "Cher" (the sailboat) or had any legal right to possess or control it" O'Leary v. State, ___ So.2d.____ (Ct. of Criminal Appeals, June 23, 1981), p.10. The State Supreme Court concluded this holding was error but was "error without injury" and "therefore does not require reversal" since that Court "proceeded to address the merits of the search and seizure issue in the context of the provisions of 19 U.S.C. Section 1581(a)" State v. O'Leary, ___ So.2d.___ (Ala.S.Ct. May 21, 1982), p.8.

The State Supreme Court ignored the language of Salvucci and later Federal Court

cases requiring reversal for the purpose of affording hearings on this issue.

4. JURY ISSUES:

Two state laws were in effect but never followed during the proceedings. The first law was involved in the indictment stage, and the second law became effective prior to the trial.

Petitioner challenged the Grand Jury that returned the indictment against him under the provisions of the old law (Code of Alabama 1975, Section 12-16-1, et seq.) and received an adverse ruling in the Trial Court and on appeal.

As summarized below, evidence at a hearing on a joint hearing to quash the indictment returned against the Petitioner and others reflected that the Jury Commission ignored the applicable provision of Code of Alabama 1975 to such an extent that the purpose of the statute was not substantially served and Defendant was deprived of his Constitutional Rights:

(1) Section 12-16-39 required the Clerk to prepare a master list of the names of all citizens of the county who were age-eligible for jury duty. No such list had ever been prepared during the memory of any jury commissioner, and the Clerk testified that she had no knowledge that she was required by law to prepare such a list. (Joint Tr. 121,176,197,212,242).

(2) Section 12-16-41 required the Clerk to scan certain lists, including registration lists. This task had never been performed. (Joint Tr. 123,213).

(3) Section 12-16-42 required annual meetings of the Jury Commission for the purpose of preparing a jury roll. The Jury Commission met occasionally, never prepared a jury roll, and merely added the names of persons they knew "personally". (Joint Tr. 178,200,218,248,245).

(4) Section 12-16-42 required jury rolls to be placed in a substantial metal box that was to be locked and kept in a safe

or vault. The box was often kept in an open courtroom and left unattended for extended periods of time. (Joint Tr. 51-52,86).

(5) Sections 12-16-45 and 12-16-46 dealt with replentishing the jury box upon its exhaustion or depletion. The box was never depleted. The names of a mere three thousand one hundred forty-five (3,145) persons on the jury roll in a county with a 1970 population of fifty-nine thousand three hundred eighty-two (59,382) were merely "recycled" by redepositing the same names over and over again into the jury box. (Joint Tr. 44,49,102-7).

(6) Sections 12-16-70 and 12-16-75 prohibited the return of the names of any jurors. This requirement was totally ignored. (Joint Tr. 47,49,102-7).

(7) Section 12-16-74 placed the responsibility on the Trial Court for passing on excuses, claims of exemptions, and qualifications. The Clerk of the Commission sometimes exercised this function when indi-

viduals told commissioners they did not want to serve on jury duty. (Joint Tr. 194).

(8) Section 12-16-2 set forth twenty-three (23) categories of persons entirely exempt from jury duty based upon the nature of their employment only.

(9) Petitioner's original trial venire contained the names of four (4) individuals whose names did not appear on any records maintained by the Clerk's Office, and there were repeated instances of multiple terms of jury service by the same individuals due to the "recycling process". (Joint Tr. 157-173, 280-281).

(10) The integrity of the statutory scheme was irrevocably impaired by the practice of Commissioner Foster of "purifying" his candidates for inclusion on the jury roll by first clearing them with the District Attorney. (Joint Tr. 221).

Petitioner also challenged the Petit Jury summoned for his July 31, 1978, trial, based on a new jury act (Act Number 594,

1978 regular session codified as Code of Alabama 1975, Volume 11-Pocket Part, Section 12-16-2), which became effective on April 27, 1978. The Act repealed many provisions of the old jury law, including those concerning exemption from jury duty and qualifications for jury service, and set forth an entirely new statutory scheme similar to many Federal Court plans.

Petitioner sought by Motion to either quash the July 31, 1978, Petit Jury Venire or, in the alternative, continue his case, pending the implementation of the new act. A hearing conducted on July 24, 1978, reflected that the proposed Petit Jury Venire had been selected in accordance with the challenged procedures followed under the old law; that the new law had not been implemented; that the Jury Commission was in the process of attempting to comply with the new statute and full compliance was expected within a mere three (3) months.(Supp.Tr."C" 1-5).

The Trial Court denied the Motion in all respects, and the State Courts affirmed on appeal.

H. STAGE AT WHICH ISSUES WERE RAISED:

The issues of unconstitutional search and seizure and unlawful arrest were raised by Motion to Suppress, Motion to Exclude, Motion for Judgment of Acquittal, and Motion for New Trial at the trial stage, and adverse rulings were received in each instance (Trial Tr. 578,582,593,709,740). The issues were also presented at each stage of the appeal by brief and by Petition for Additional or Corrected Statement of Facts, etc., directed to the Court of Criminal Appeals.

The issue involving the Appellate Court's failure to remand for hearing following the change in the law concerning "automatic standing" by this Court did not arise until after the decision rendered by the Court of Criminal Appeals. The issue was then raised at the earliest opportunity before the State Supreme Court, which treated

the lower court's opinion as "error without injury."

The issues involving the Grand and Petit Jury Venires were raised by Motion to Quash Indictment and Strike Venire of Grand Jurors and Motion to Quash Petit Jury or in the Alternative for Continuance. (Trial Tr.623,629). The issues were also presented at each stage of the appeal by brief and by Petition for Additional or Corrected Statement of Facts, etc., directed to the Court of Criminal Appeals.

I. ARGUMENT:

1-2. UNCONSTITUTIONAL SEARCH AND SEIZURE AND UNLAWFUL ARREST:

The facts clearly demonstrate that the vessels involved were boarded only at the order of Baldwin County Deputies based on their naked suspicion alone. The State has never attempted to justify the rape of the vessels involved under any exception allowing search without warrant.

The State has cited the provisions of 19 U.S.C. Section 1581 as a basis for the exploratory warrantless search; however, the sailboat was first sighted within the territorial waters of the United States in the east to west intercoastal waterway transversing Mobile Bay, which is the only point of sufficient depth for navigation. The Customs Officers who later boarded the sailboat, only on the orders of the Baldwin County Deputies, had no prior information concerning the sailboat having been outside the territorial limits of the United States

or having contacted any other vessel which had been in international waters. The officers had never seen the sailboat prior to the evening in question, did not know the name of the vessel, had no information as to the homeport of the vessel, had no knowledge, whatsoever, whether the boat "came foreign", did not know who might be aboard the vessel, could not see any individuals aboard the vessel, and had no idea what, if anything, might be aboard the vessel.

There were no articulable facts upon which any boarding could be made under the claimed authority of the statute. This Court recently granted certiorari in United States v. Villanmonta-Marquez, 652 F.2d 481 (5th Cir.), rehearing En. Banc. denied 661 F.2d 577 (5th Cir. 1981), Petition for Cert. granted, ___ U.S. Law Week __, June 7, 1982, in a situation where the Fifth Circuit reasoned "the facts could support nothing more that a generalized suspicion and speculation in the minds of officer". Id. 652 F2d 488.

Moreover, Petitioner contends the statute itself is unconstitutional for failure to impose geographical limits or restraints on the expansive language.

The Fourth Amendment imposes a reasonableness requirement on custom searches. United States v. Almeida-Sanchez, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). Strict application of the literal terms of the above-quoted statute to every vessel would "subvert" the Fourth Amendment. United States v. Jones, 528 F.2d 303, 304 (9th Cir. 1975).

3. REVERSAL OF AUTOMATIC STANDING QUESTION:

The State Courts' switch from "no standing" to "error without injury" totally ignores the now clear mandate of the companion decisions of Salvucci and Rawlings, supra. In Salvucci, this Court noted:

> We therefore think it appropriate to remand so that respondents will have an opportunity to demonstrate, if they can, that their own Fourth Amendment rights were violated.

In the instant case, Petitioner's hearing on Motion to Suppress was held on February 14-17, 1978, and the Petitioner relied upon "automatic standing" and could not have known that the "automatic standing" doctrine would be specifically overruled by this Court. See also United States v. Molina-Garcia, 634 F.2d 217,218, Note 1 (5th Cir. 1981).

4. JURY ISSUES:

The State Court erred in its application of the Fifth, Sixth, and Fourteenth Amendments to the Constitution and the laws of the State of Alabama with respect to the Grand and Petit Jury Challenges. The denial of these fundamental rights warrants reversal.

The Jury Commission in Baldwin County completely ignored the applicable statutory provisions of the old jury law which were in effect and used to summon and impanel the

Grand Jury that returned the indictment against the Defendant.

Petitioner respectfully asserts that the integrity of the statutory scheme was irrevocably impaired by the Commissioner's practice of "purifying" potential candidates for inclusion on the jury, as well as by the repeated "recycling" of the three thousand one hundred forty-five (3,145) persons on the jury roll which resulted in "blue ribbon prosecution juries" which excluded a broad spectrum of the population of the county, including those specifically exempted by occupation.

The Petit Jury challenge was based on the provisions of a new law that became effective April 27, 1978, requiring the complete emptying and refilling of the jury box in July of that year and repealed the exemptions based on employment. The new act also created an entirely new scheme designed to secure a cross-section of the community.

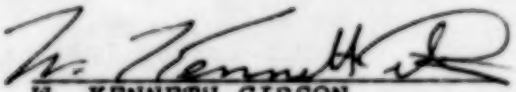
Evidence at the hearing on the Motion demonstrated that the Jury Commission was in the process of attempting to comply with that statute and expected full compliance within a matter of three (3) months. (Supp.Tr."C" 1-5).

J. RECENT DECISION GRANTING WRIT OF CERTIORARI IN RELATED CASE:

The attention of the reader is directed to the recent ruling of the United States Supreme Court granting a Writ of Certiorari in United States v. Villamonte-Marquez, 652 F2d 481 (5th Cir. 1981), rehearing En. Banc. denied 651 F2d 577 (5th Cir. 1981), Petition for Cert. granted, ___ U.S. Law Week ___ (June 7, 1982). The Fifth Circuit opinion dealt with the application and constitutionality of 19 U.S.C. Section 1581.

WHEREFORE, Petitioner respectfully requests that after a preliminary examination, the Writ of Certiorari be granted in this case and that this Court proceed under its rules to review the matters complained of and to reverse the judgment of the State

Courts and for such other relief as to which Petitioner may be entitled, premises considered.



W. KENNETH GIBSON
Attorney for Petitioner

CERTIFICATE OF APPLICABILITY

Petitioner certifies and herein recites that 28 U.S.C.A. Section 2403 is or may be applicable in that the constitutionality of the provisions of 19 U.S.C.A. Section 1581 are drawn into question and neither the United States nor any agency, officer, or employee thereof is a party. Petitioner further certifies that a copy of the foregoing Petition for Writ of Certiorari has been served upon the Solicitor General, Department of Justice, Washington, D.C., 20530, by United States Mail on the date indicated below.

CERTIFICATE OF FILING

I, W. Kenneth Gibson, the Attorney for the Petitioner, hereby certify that the number of copies of this petition required by Rule 19 of the Supreme Court Rules to be filed, to-wit, an original and forty (40) copies, with the Clerk of the United States Supreme Court, were placed by me in the United States Mail, certified, return receipt requested, first-class postage prepaid, addressed to The Honorable Alexander Stevas, Clerk of the United States Supreme Court, pursuant to the provisions of Rule 19 of the Supreme Court Rules, on the date indicated below.

CERTIFICATE OF SERVICE

I, W. Kenneth Gibson, the Attorney for the Petitioner, hereby certify that the number of copies of this petition required

by Rule 28 of the Supreme Court Rules have been served on the opposing party in this proceeding by mailing a copy of the petition to the Attorney General of the State of Alabama, by certified mail, return receipt requested, first-class postage prepaid, addressed to The Honorable J. Anthony McLain, Assistant Attorney General of the State of Alabama, and that an additional copy has been served pursuant to Rule 28.4(b) upon the Solicitor General, Department of Justice, Washington, D.C. 20530, on the date indicated below.

Done this 14th day of September, 1982, by depositing the same in the United States Post Office, with first-class postage prepaid, and properly addressed to the Clerk and parties indicated hereinabove on this date.

W. KENNETH GIBSON
Attorney for Petitioner

Sworn to and subscribed
before me on this the
14th day of September, 1982.

NOTARY PUBLIC
My Commission Expires December 5, 1983